82-669

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No.____

IN THE

Supreme Court of the United States

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sidney L. Soffer
900 Arbor Street
Costa Mesa, Ca. 92627
(714) 642-5511
Pro Se

Questions Presented for Review

1. Whether the rights guaranteed to Petitioner by the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the City of Costa Mesa by the actions of Costa Mesa Enforcement Officer James Weir and City Attorney Robert Campagna in depriving Petitioner of his vehicles without providing Petitioner a prior evidentiary hearing and/or a post evidentiary hearing to establish the fact of Petitioner's vehicles being abandoned, wrecked, dismantled, or imoperative pursuant to Chapter III, Article 6, Division I, Costa Mesa Municipal Code and Public Nuisances at which Petitioner could

confront and cross-examine any witnesses upon whose testimony the City would depend upon and at which Petitioner could present evidence on his own behalf.

2. Whether conditioning a probably cause hearing on the request of the individual is a reversal of usual due process.

3. Whether the Costa Mesa ordinance is unconstitutional on its face as it mandates a permanet deprivation of the vehicle if a request for a hearing is not initiated by the individual and it provides no definitions or standards for its enforcement.

4. Whether the towing of Petitioner's vehicles without a 10-day Notice fails to afford due process guaranteed to him by the 14th Amendment

5. Whether Section 23 of the California Vehicle Code extended the time that Petitioner had to initiate a Request for a Hearing, and if so, by the City failing to extend the time by four days, did the City deny Petitioner due process.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sidney L. Soffer, your Petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the Judgment in the above case.

Ninth Circuit to review the Judgment in the above case.

OPINIONS BELOW

No opinion was rendered by the Court of Appeals; its Memorandum is reproduced in Appendix A to this Petition. The Order denying the rehearing en banc etc. is reproduced in Appendix B to this Petition. There was no formal opinion of the District Court.

JURISDICTION

The Memorandum of the Court of Appeals (Appendix A) affirming the Judgment of the District Court was filed on May 4, 1982. A timely Petition for Rehearing was denied on July 9, 1982.

The jurisdiction of this Court is invoked under 28 U.S. 1254 (i).

STATUTES, ORDINANCE AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional, statutory provisions and ordinances are set forth in Appendix "D"; they are:

1. Fourteenth Amendment to the United States Constitution;

2. The City of Costa Mesa's Ordinance No. 73.13;

3. Section 23, California Vehicle Code

STATEMENT OF CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §1343 and §1331, this being an action arising under the Constitution and Laws of the United States.

In October of 1977, JAMES WEIR, enforcement officer for the City of Costa Mesa told Petitioner Sidney Soffer that three vehicles parked on Soffer's driveway were in violation of a City ordinance. Shortly thereafter Respondent Weir mailed three Notices of Intention to Abate and Remove Abandoned, Wrecked, Dismantled or Inoperative Vehicles or Part Thereof, as a Public Nuisance. The Notice gave Petitioner three options: 1) Remove said

vehicle (or part of a vehicle), 2) Request a public hearing or 3) Submit a sworn written statement denying responsibility for the presence of said vehicles (or parts of a vehicle) on said land with your reasons for denial. The Notice also stated: "You are hereby notified that, upon your failure to initiate at least one of the above actions within ten (10) days of the mailing of this notice, the City of Costa Mesa shall have the authority to abate and remove said nuisance without a public hearing and the costs thereof together with administrative costs, assessed to you as owner of the land on which said vehicle (or parts of a vehicle) is located." The Notice was mailed October 25,

1977. As the Notice contained no instructions as to the form of the Request for a Public Hearing, Petitioner circled option #2. Request a Public Hearing on all three notices and mailed them as instructed to James T. Weir, P.O. Box 1200, 77 Fair Drive, Costa Mesa, California 92626. Petitioner sent the three requests certified mail and they were postmarked November 4, 1977, ten calendar days from Octber 25, 1977 per instructions on the Notice. Nothing in the Notice indicated that "received within ten days" - a much stricter standard - would be used to judge timeliness.

As the three notices contained Petitioner's name and address and the date

mailed to Petitioner plus the "Request a Public Hearing" circled, Petitioner felt all the information to receive a public hearing was sent to the City. Four days later, November 8, 1977, Respondent Weir arrived at Soffer's house and informed Petitioner that he was there to tow away his three vehicles. In disbelief, Soffer tried to explain to Weir that he had timely mailed the Request for Hearing and his vehicles should not be towed away. Weir stated that the City Ordinance stated the Notices had to be received by the City within such 10 day notice not just postmarked. Soffer produced the three receipts for certified mail containing Weir's name and dated November 4, 1977,

but Weir said they were too late and anyway he, Weir, did not know what was contained in the three letters so the vehicles were to be towed. Soffer requested Weir to wait one day to allow Soffer to try and resolve the problem of the timeliness of the Notices but Weir refused. Soffer then phoned the City Attorney of Costa Mesa, Robert R. Campagna, hoping Campagna would tell Weir not to tow the vehicles. Soffer explained to Campagna that he had in fact mailed the three Notices on time and again requested one additional day to try and solve the problem. Campagna talked to Weir for three or four minutes on the phone and then told Soffer "Mr. Soffer, we have had trouble

getting your attention; and now that we have your attention, we are going to tow your cars away." At that time, Weir ordered the vehicles towed and against Petitioner's continued protests and without Warrant or Judgment or hearing, the three vehicles were towed away.

On November 21, 1978 Petitioner filed suit in the U.S. District Court, Central District of California for deprivation of civil rights, deprivation of property, without due process of law and conspiracy. Three amended Complaints plus Motion for Summary Judgment and many motions later, it went to jury trial. On January 9, 1981, the jury found in favor of Defendants and against Plaintiffs.

Petitioner timely filed a Motion for New Trial on January 11, 1981, on the following grounds:

1. The verdict of the jury was agin-st the clear weight of the evidence and a miscarraige of justice.

2. The failure of the Court to find that the Ordinance was unconstitutional resulted in confusing the jury as to the questions of fact to be decided by them.

3. The Plaintiff did not have ade-quate opportunity to review the jury in-structions and to contest Defendant's ob-jection to jury instruction D. On February 23, 1981, the Motion for New Trial was denied.

Petitioner filed a timely Notice of Appeal to the 9th Circuit Court of Appeal from Judgment entered on January 13, 1981 after filing timely Briefs and oral argument, the Court of Appeals filed a Memorandum on May 4, 1982 affirming the Judgment of the District Court. The issues presented to the Court of Appeals were as follows:

1. Whether the Ordinance is unconstitutional on its face.

2. Whether the Ordinance as applied denied to Appellant due process of law.

3. Whether the Court committed reversible error on May 21, 1982

Petitioner filed a timely Petition for a Rehearing and a suggestion for Rehearing en banc on the following grounds:

1. An apparent conflict with the decision of this court in Doe v. Gallinot No. 80-5658, decided September 10, 1981 (Slip opinion page 4860).

2. Soffer respectfully submits the court misapprehends the meaning of due

process and/or overlooked some of the facts.

3. Soffer respectfully submits that the question of jury instruction No. D (Appendix E) was handled poorly by both this court and by Soffer.

4. Soffer also respectfully submits that the court's memorandum does not address the issue as to whether or not Soffer's request for a hearing was timely.

5. Soffer respectfully submits that there is an apparent conflict with the decision of this court in Stypmann v. City of San Francisco 557 F. 2d. 1338 (Ninth Circuit Court of Appeals, 1977)

On the 9th day of July, 1982, the Court of Appeals filed a Denial to

Soffer's Petition for Rehearing and rejected the suggestion for a rehearing en banc.

REASON FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS AS TO THE PROPER INTERPRETATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. of the Fourteenth Amendment provides ..."Nor shall any State deprive any person of life, liberty, or property, without due process of law"...

In reliance upon what it conceived to be the principles established, the Ninth Circuit has here held that Notice and op-

portunity to be heard within the meaning of due process includes something less than prior notice of the inquiry, its purpose, the alleged violations, and the time and place of the hearing, with opportunity to be heard in person and to present witnesses and documentary evidence before a neutral and detached hearing body. Morrisesey v. Brewer 408 U.S. 471 (1971). The Ninth Circuit by focusing on the literal meaning of notice and opportunity to be heard has ruled that Petitioner had an opportunity to initiate a request for a hearing, thereby satisfying the requirements of due process. (See Notice to Abate Appendix C).

The Ninth Circuit here is also in direct conflict with other decisions of the Ninth Circuit, which held that conditioning a probable cause hearing on the request of the individual reverses the usual due process analysis and "the State must initiate the hearing and justify the deprivation. Doe v. Gallinot, 486 F. Supp 983, and affirmed by the Ninth Circuit Court of Appeals. Doe v. Gallinot, 657 F. 2d 1017. (Sept. 10, 1981). While Doe was concerned not with the deprivation of property, but of liberty, it stated "even in civil cases where the deprivation is of property rather than liberty, the State must initiate the hearing and justify the deprivation..."

In a case more on point, the Ninth Circuit has held that the "seizure of property without prior hearing has been sustained only where the owner is afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of probably cause." Stypmann v. City of San Francisco, 557 F 2d 1338 (9th Cir. 1977). Stypmann was a vehicle tow case that held a City ordinance unconstitutional as well as the lien provisions of California Vehicle Code §22851 to be void insofar as they did not provide persons whose cars had been towed with a prompt and properly noticed post-seizure hearing at which vehicle owners could test the factual basis for the

tow. It should be noted that Stypmann has been cited and followed all over the county by Federal as well as State courts. On Sept. 28, 1979, Robert F. Peckham, Chief United States District Judge for the Northern District of California in a 30 page memorandum re Motion for Class Certification and Cross Motions for Summary Judgement, concluded and held that C.V.C. Sections 22702 (A), 22652(A) and 22657(c), as well as two municipal codes were unconstitutional as they violate due process because they do not provide for notice and a hearing prior to seizure. Judge Peckham followed the decision in Stypmann as well as other tow cases from other circuits. Judge Peckham also certified that all

judges concerned concurred in the within memorandum. Geanalds v. Nelson and Kemp v. Gain No. C-74-246 RFP and No. C-75-0993 RFP. U.S. District Court for the Northern District of California. Petitioner would like to point out that although it was not a Court of Appeals, it was a three judge panel and the most complete analysis Petitioner has read in over three years of reading cases on vehicle towing.

This decision is also in direct conflict with the California Supreme Court in its holding that "it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing...People v. Broad, 216 Cal. 1, at 7.

Although Petitioner could cite many more cases that are in conflict with the Ninth Circuit holding, Petitioner feels that if given the opportunity, a Brief would be the proper place.

The above conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING DUE PROCESS

The Ninth Circuit's opinion in this case reflects what many courts have stated in the past. To quote only a few, "Due

process is a frequently explained and vaguely defined term. The Supreme Court's statement in Mathews v. Eldridge, 424 U.S. 319 at 333 (1976), is representative. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965)...The Fifth Circuit frankly describes the due process clause as "the elusive Fourteenth Amendment proscription on denial of property without due process of the law." Roane v. Callisburg Independent School District 511 F. 2d. 633, 635 (5th Cir '75). "Each case turns

almost entirely upon its facts." Burgess v. Miller 492 F. Supp. 1284 at 1290 (1980).

Burges, supra gives other examples and then concluded by stating, "the only universal requirement is that a person receive notice and an opportunity to be heard."

The plain meaning of the above statement has been mistakenly construed by the City of Costa Mesa, the District Court and the Ninth Circuit to mean an opportunity to initiate a request for a hearing.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Sidney L. Soffer
900 Arbor Street
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(714) 642-5511
Pro Se

October 7, 1982

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIDNEY L. SOFFER,	)	No. 81-5240
	)	
Plaintiff-Appellant,	)	D.C. No. CV 78-4435 AWT
	)	
v.	)	MEMORANDUM
	)	
CITY OF COSTA MESAA, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court for the Central District of California
The Honorable A. Wallace Tashima, Presiding
Argued and Submitted March 5, 1982
Decided:

Before: HUG, TANG and PREGERSON, Circuit Judges.

Pursuant to a city nuisance abatement ordinance, the City of Costa Mesa, California towed three cars from Sidney Soffer's front yard. Soffer then brought this 42 U.S.C.

§1983 action against the City, city zoning officer James Weir, and City Attorney Robert Campagna, alleging that the ordinance was unconstitutionally vague and overbroad and that the ordinance, as applied, denied him due process of law. The district court entered a judgment for the defendants upon a jury verdict.

On appeal, Soffer asserts that the district court erred in failing to find, as a matter of law, that the ordinance was unconstitutional and that the notice he received was inadequate. In addition, he asserts that the trial court erred in failing to give a requested jury instruction. Because these contentions lack merit, we affirm the judgment of the district court.

The ordinance declares the storage of "wrecked, dismanteld or inoperative" vehicles, visible from the street, on public or private property, to be a public nuisance and grants the City Council authority to abate such nuisances by having the vehicles removed in accordance with certain notice and hearing requirements. City of Costa Mesa Ordinance No. 73-13, Article 6, Section 1. Soffer's vehicles, which were not registered and did not have current license plates attached, were determined to be "inoperative" within the meaning of the ordinance because they did not qualify to be operated on the highways under the California Vehicle Code. Soffer contends that the ordinance is facially vague and overbroad because it fails to

define the term "inoperative." Thus, he argues, the determination whether a vehicle is "inoperative," and therfore constitutes a public nuisance, is impermissibly left to the subjective evaluation of a city official. This contention is unpersuasive.

The ordinance prohibits a person from storing upon his property any automobile that "does not qualify to be operated on the highways under the Vehicle Code of the State of California ...." City of Costa Mesa Ordinance No. 73-13, Article 6, Section 20. The term "inoperative vehicle" has a defined meaning under the California Vehicle Code. California Vehicle Code, Section 5202 provides that a vehicle may not be "operated" unless the license plate is "attached and

displayed on the vehicle." Section 4000 of the California Vehicle Code prohibits an individual from operating an unregistered vehicle. Thus, the ordinance is neither vague nor overly broad because, when applied in conjunction with the Vehicle Code, it gives a person of ordinary intelligence fair notice that his contemplated conduct is prohibited. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

Moreover, there is little, if any, danger of arbitrary or discriminatory enforcement of the ordinance. Enforcement of the ordinance is not left to the subjective evaluation of Costa Mesa's enforcement officers as to the meaning of the term "inoperative." As demonstrated by the facts of

this case, city officials are governed by the meaning of the term "inoperative" under the California Vehicle Code.

Soffer next asserts that the ordinance, as applied, deprived him of due process of law because the pre-abatement notice that set forth the time limit for requesting a hearing was constitutionally inadequate. We disagree. The Due Process Clause requires that parties whose rights are to be affected are entitled to be notified of the proposed action and they are entitled to be heard. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Baldwin v. Hale, 68 U.S. 223, 233 (1863). It is also a fundamental requirement of due process that the opportunity to be heard be granted "at a meaningful time and in a

meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The question of what form of due process is constitutionally adequate must be answered in relation to the circumstances of each particular case; due process varies with the subject matter and requirements of each situation. See Fuentes v. Shevin, 407 U.S. 67 (1972). An examination of the record in this case indicates that the notice and the opportunity for a hearing that Soffer received satisfied the requirements of due process.

Finally, Soffer contends that the district court erred in failing to give his proposed juryinstruction on the requirements of due process. The substance of Soffer's

proposed instruction was that if the jury concluded that the cars did not, in fact, constitute public nuisances, it must find that Soffer's property was taken without due process of law. Soffer asserts that without this instruction the jury was given no guidance concerning what factors were necessary to a determination that the City's procedure failed to comply with due process.

The trial court fully set foth the due process requirements in Instructin C. Moreover, Soffer's proposed instruction was not an accurate statement of the fundamental requirements of due process. Even if Soffer's vehicles did not, in fact, constitute public nuisances, it does not necessarily follow that the City's action in

removing them amounted to a deprivation of property without due process of law. See Rogers v. Okin, 634 F. 2d 650, (1st Cir. 1980). The real issue, as properly set forth in Instruction C, was whether Soffer had notice and an opportunity to be head before the cars were removed.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIDNEY L. SOFFER,	)	No. 81-5240
	)	
Plaintiff-Appellant,	)	D.C. No. CV 78-4435 AWT
	)	
v.	)	ORDER
	)	
CITY OF COSTA MESAA, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court for the Central District of California

Before: HUG, TANG and PREGERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court

has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

CITY OF COSTA MESA
California 92626 P.O. Box 1200

From the Office of the Planning Dept.

NOICE OF INTENTION TO ABATE AND REMOVE
AN ABANDONED, WRECKED, DISMANTLED
OR INOPERATIVE VEHICLE OR PARTS THEREOF
AS A PUBLIC NUISANCE

To: Sidney Lester Soffer
Address: 900 Arbor St.
Costa Mesa, Ca. 92626

Description: Registered Owner: Not Available
Legal Owner: Not Available
License No. Not Available

Temporary DMV Receipt No. 6299044 shows date sold 8/19/75, Sidney Lester Soffer, Cadillac, 2 door seda, medium blue, roof shows deterioration, stored on front yard.

As owner of the land on which said veicle (or said parts of a vehicle) is located, you are hereby notified that within ten (10) days of the mailing of this notice of intention you may:

1. Remove said vehicle (or parts of a vehicle)

2. Request a public hearing

APPENDIX "C"

3. Submit a sworn written statement denying responsibility for the presence of said vehicle (or parts of a vehicle) on said land with your reasons for denial

Such statement will be construed as a request for hearing at which your presence is not required. You may appear at any hearing request by you or the owner of the vehicle, or in lieu thereof, present a sworn statement as aforesaid (#3 above) in time for consideration at such hearing.

All request for hearing, sworn statements and/or other correspondence should be addresed to:

Attention: James T. Weir, P.O. Box 1200, 77 Fair Drive, Costa Mesa, Ca. 92626

You are hereby notifeid that, upon failure to initiate at least one of the above actions within ten (10) days of the mailing of this notice, the City of Costa Mesa shall have the authority to abate and remove said nuisance without a public hearing and the costs thereof together with administrative costs, assessed to you as owner of the land on which said vehicle (or parts of a vehicle) is located.

CITY OF COSTA MESA

NOTICE MAILED OCTOBER 25, 1977

BY (JAMES WEIR)
ENFORCEMENT OFFICER

ORDINANCE NO. 73-13

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COSTA MESA PROVIDING FOR THE ABATEMENT AND REMOVAL AS PUBLIC NUISANCES OF ABANDONED, WRECKED, DISMANTLED OR INOPERATIVE VEHICLES OR PARTS THEREOF FROM PRIVATE PROPERTY OR PUBLIC PROPERTY, NOT INCLUDING HIGHWAYS, AND RECOVERY OF COSTS OF ADMINISTRATION THEREOF AS AUTHORIZED BY SECTION 22660 VEHICLE CODE; BY AMENDING THE CITY OF COSTA MESA MUNICIPAL CODE, ADDING THERETO ARTICLE 6 OF CHAPTER III.

THE CITY COUNCIL OF THE CITY OF COSTA MESA DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. In accordance with the determination made and the authority granted by the State of California under Section 22660 of the Vehicle Code to remove abandoned, wrecked, dismantled or inoperative vehicles or parts thereof as public nuisances, the City Council of the City of Costa Mesa hereby makes the following findings and declarations:

The accumulation and storage of abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof on private or public property not including highways is hereby found to create a condition tending to reduce the value of private property, to promote blight and deterioration, to invite plundering, to create fire hazards, to constitute an attractive nuisance creating a hazard to the health and safety of minors, to create a harborage for rodents and insects and to be injurious to the health, safety and general welfare of the public.

Accodingly, there is hereby enacted Division I and II of Article 6, Chapter III Costa Mesa Municipal Code which shall read as follows:

SECTION 2. "ARTICLE 6

ABANDONED VEHICLES

DIVISION I

Section 1. Public Nuisance The presence of an abandoned, wrecked, dismanteled or inoperative vehicle or parts thereof, on private or public property not including highways, except as expressly hereinafter permitted, is heeby declared to constitute a public nuisance which may be abated as such in accordance with the provisions of this Ordinance.

Section 2. Definitions. For the purpose of this Chapter, the following terms shall have the following meanings unless it is clear from the context that a different meaning is intended:

(a) 'VEHICLE' means a device by which any person or property may be propelled, moved, or drawn upon a highway, except a device moved by human power or used exclusively upon stationary rails or tracts.

(b) 'HIGHWAY' means a way or place or whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.

(c) 'PUBLIC PROPERTY' does not include 'highway'.

(d) 'OWNER OF THE LAND' means the owner of the land on which the vehicle, or parts thereof, is located, as shown on the last equalized assessment roll.

(e) 'OWNER OF THE VEHICLE' means the last registered owner and legal owner of record.

Section 3. Exclusions. This chapter shall not apply to:

(a) A vehicle, or parts thereof, completely enclosed within a building in a lawful manner, and not visible from the street or other public or private property; or

(b) A vehicle, or parts thereof, stored or parked in a lawful manner on private property in connection with the business of a license dismantler, licensed vehicle dealer, a junk dealer, or when such storage or parking is necessary to the operation of a lawfully conducted business or commercial enterprise.

(c) A vehicle or parts thereof stored or parked on private or public property pursuant to permit granted by the City of Costa Mesa for that purpose.

Nothing in this section shall authorize the maintenance of a public or private nuisance as defined under provisions of law other than Chapte 10 (commencing with Section 22650) of Division 11 of the Vehicle Code and this Ordinance.

Section 4. Enforcement. Except as otherwise provided for herein, the provisions of this Ordinance shall be administered and enforced by the City Council who may from time to time delegate all or any portion of the duties hereunder to the

City Manager or his duly authorized agents. In the enforcement of this Ordinance such agents may enter upon private or public property eo examine a vehicle or parts thereof, or obtain information as to the identity of a vehicle and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this Ordinance.

Section 5. Franchise Removal. When the City Council has contracted with or granted a franchise to any person or persons, such person or persons shall be authorized to enter upon private property o r public property to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance, pursuant to this Ordinance.

Section 6. Administrative Costs. The City Council shall from time to time determine and fix an amount to be assessed as administrative costs (excluding the actual cost of removal of any vehicle or parts thereof) under this chapter.

Section 7. Abatement. Upon discovering the existence of an abandoned, wrecked, dismantled, or inoperative vehicle, or parts thereof, on private property or public property within the City, the City Council shall have the authority to cause the abatement and removal thereof in accordance with the procedure prescribed herein.

Section 8. Notice. A ten (10) day notice of intention to abate and remove

the vehicle, or parts thereof, as a public nuisance shall be mailed by registered mail to the owner of the land and to the owner of the vehicle, unless the vehicle is in such condition that identification numbers are not available to determine ownership. The notices of intention shall be in substantially the following forms:

NOTICE OF INTENTION TO ABATE AND REMOVE AN ABANDONED, WRECKED, DISMANTLED, OR INOPERATIVE VEHICLE OR PARTS THEREOF AS A PUBLIC NUISANCE.

(Name and address of owner of the land)

As owner shown on the last equalized assessment roll of the land located at (address), you are hereby notified that the undersigned pursuant to (Chapter III, Article 6, Division I, Costa Mesa

Municipal Code) has determined that there exists upon said land an (or parts of an) abandoned, wrecked, dismanteled or inoperative vehicle registered to _____ _____ license number _____, which constitutes a public nuisance.

You are hereby notified to abate said nuisance by the removal of said vehicle (or said parts of a vehicle) within 10 days from the date of mailing of this notice, and upon your failure to do so the same will be abated and removed by the City of Costa Mesa, and the costs thereof, together with administrative costs, assessed to you as owner of the land on which

said vehicle (or said parts of a vehicle) is located.

As owner of the land on which said vehicle (or said parts of a vehicle) is located, you are hereby notified that you may, within 10 days after the mailing of this notice of intention, request a public hearing and if such a request is not received by the City Council within such 10 day period, the City of Costa Mesa shall have the authority to abate and remove said vehicle (or said parts of a vehicle) as a public nuisance and assess the costs as aforesaid without a public hearing. You may submit a sworn written statement within such 10 day period denying responsibility for the presence of said vehicle

(or said parts of a vehicle) on said land, with your reasons for denial, and such statement shall be construed as a request for hearing at which your presence is not required. You may appear in person at any hearing requested byyou or the owner of the vehicle or, in lieu thereof, may present a sworn written statement as aforesaid in time for consideration at such hearing.

Notice Mailed _____
(Date)

CITY OF COSTA MESA

By_____
City Manager

NOTICE OF INTENTION TO ABATE AND REMOVE AND ABANDONED, WRECKED, DISMANTLED OR INOPERATIVE VEHICLE OR PARTS THEREOF AS A PUBLIC NUISANCE.

(Name and address of last registered and/or legal owner of record of vehicle -- notice should be given to both if different)

As last registered (and/or legal) owner of record of (description of vehicle - make, model, license, etc.) you are hereby notified that the undersigned pursuant to Chapter III, Article 6, Division I, Costa Mesa Municipal Code has determined that said vehicle (or parts of a vehicle) exists as an abandoned, wrecked, dismantled or inoperative vehicle at (describe location on public or private property) and constitutes a public nuisance pursuant to the provisions of said Municipal Code.

You are hereby notified to abate said nuisance by the removal of said vehicle

(or said parts of a vehicle) within 10 days from the date of mailing of this notice.

As registered (and/or legal) owner of record of said vehicle (or said parts of a vehicle), you are hereby notified that you may, within 10 days after the mailing of this notice of intention, request a public hearing and if such a request is not received by the Planning Commission within such 10 day period, the City Council shall have the authority to abate and remove said vehicle (or said parts of a vehicle) without a hearing.

Notice Mailed:_____

CITY OF COSTA MESA

By_____
City Manager

Section 9. Public Hearing. Upon request by the owner of the vehicle or owner of the land received by the City within 10 days after the mailing of the notices of intention to abate and remove, a public hearing shall be held by the Planning Commission on the question of abatement and removal of the vehicle or parts thereof as an abandoned, wrecked, dismantled or inoperative vehicle, and the assessment of the administrative costs and the cost of removal of the vehicle or parts thereof against the property on which it is located.

Section 10. Written Denial - Land Owner If the owner of the land submits a sworn written statement denying responsi-

bility for the presence of the vehicle on his land within such 10 day period, said statement shall be construed as a request for a hearing which does not require his presence. Notice of the hearing shall be mailed, by registered mail, at least 10 days before the hearing to the owner of the land and to the owner of the vehicle, unless the vehicle is in such condition that identification numbers are not available to determine ownership. If such a request for hearing is not received within said 10 days after mailing of the notice of intention to abate and remove, the City shall have the authority to abate and remove the vehicle or parts thereof as a public nusiance (sic) without holding a public hearing.

Section 11. Hearing Body - Planning Commission

All hearings under this Ordinance shall be held before the Planning Commission which shall hear all facts and testimony it deems pertinent. Said facts and testimony may include testimony on the condition of the vehicle or parts thereof and the circumstances concerning its location on the said private property or public property. The Planning Commission shall not be limited by the technical rules of evidence. The owner of the land may appear in person at the hearing or present a sworn written statement in time for consideration at the hearing, and deny responsibility for the presence of the

vehicle on the land, with his reasons for such denial.

Section 12. Hearing Body - Powers

The Planning Commission may impose such conditions and take such other action as it deems appropriate under the circumstances to carry out the purposes of this Ordinance. It may delay the time for removal of the vehicle or parts thereof if, in the opinion, the circumstances justify it. At the conclusion of the public hearing, the Planning Commission may find that a vehicle or parts thereof has been abandoned, wrecked, dismantled, or is inoperative on private or public property and order the same removed from the property as a public nusiance (sic)

and disposed of as hereinafter provided and determine the administrative costs and the cost of removal to be charged against the owner of the land. The order requiring removal shall include a description of the vehicle or parts thereof and the correct identification number and license number of the vehicle, if available at the site.

If it is determined at the hearing that the vehicle was placed on the land without the consent of the owner of the land and that he has not subsequently acquiesced in its presence, the Planning Commission shall not assess the costs of administration or removal of the vehicle against the property upon which the ve-

hicle is located or otherwise attempt to collect such costs from such owner of the land.

If the owner of the land submits a sworn written statement denying responsibility for the presence of the vehicle on his land but does not appear, or if an interested party makes a written prsentation to the Planning Commission but does not appear, he shall be notified in writing of the decision.

Section 13. Appeal. Any interested party may appeal the decision of the Planning Commission by filing a written notice of appeal with the said City Clerk within five (5) days after its decision.

Such appeal shall be heard by the City Council which may affirm, amend or reverse the order or take other action deemed appropriate.

The clerk shall give written notice of the time and place of the hearing to the appellant and those persons specified in Section 8.

In conducting the hearing the City Council shall not be limited by the technical rules of evidence.

Section 14. Disposal. Five (5) days after adoption of the order declaring the vehicle or parts thereof to be a public nuisance, or five (5) days from the date of mailing of notice of the decision if such notice is required by Section 12, or

15 days after such action of the governing body authorizing removal following appeal, the vehicle or parts thereof may be disposed of by removal to a scrapyard or automobile dismantler's yard. After a vehicle has been removed it shall not thereafter be reconstructed or made operable.

Section 15. Department of Motor Vehicles Notice. Within five (5) days after the date of removal of the vehicle or parts thereof, notice shall be given to the Department of Motor Vehicles identifying the vehicle or parts thereof removed. At the same time there shall be transmitted to the Department of Motor Vehicles any evidence of registration

available, including registration certificates, certificates of title and license plates.

Section 16. Costs of Removal Assessed. If the administrative costs and the cost of removal which are charged against the owner of a parcel of land pursuant to Section 12 are not paid within 30 days of the date of the order, or the final disposition of an appeal therefrom, such costs shall be assessed against the parcel of land pursuant to Section 3877.5 of the Government Code, and shall be transmitted to the tax Collector for collection. Said assessment shall have the same priority as other city taxes.

Section 17. Nonexclusive Remedy.

This chapter is not the exclusive regulation of abandoned, wrecked, dismantled or inoperative vehicles with the City of Costa Mesa. It shall supplement and be in addition to the other regulatory codes, statutes, and ordinances heretofore or hereafter enacted by the City of Costa Mesa, the State, or any other legal entity or agency having jurisdiction.

DIVISION II

AUTO WRECKING, DISASSEMBLING AND DISMANTLING BUSINESS

Section 18. Dismantling of Vehicles - Eight Foot Fence Required.

Any person in the business of dismantling or disassembling automobiles, trucks, or vehicles of any kind, except

within a building, shall dismantle or disassemble such automobiel truck, or other vehicle behind a fence not less than eight (8) feet in height, and said fence must be located a distance of twenty-five (25) feet from the front and side street lines of the piece of land, and so constructed as to conceal all material upon said property, extending around all sides of the lot or piece of land upon which said disassembling or dismantling is conducted.

Section 19. Report to Police. Contents.

Before dismantling or disassembling any automobile, truck or other vehicle, the person in the business of dismantling

and proposing to do so must first make a report in writing to the Chief of Police of the City giving the name and make of the automobile or truck, the model thereof, the owner if known, the State license number and the engine number thereof, and the manner in which said automobile, truck or other vehicle was obtained; and no such automobile, truck or other vehicle shall be dismantled earlier than three (3) hours after such report is made.

Section 20. Storing of Dismantled Vehicles.

No person shall store or allow to be stored upon his property any automobile, truck or other vehicle which is either dismantled or disassembled, either in

whole or in part, or does not qualify to be operated on the highways under the Vehicle Code of the State of California, without first obtaining a permit from the City Council.

Section 21. Same. Exception. Licensed Business.

The provisions of this Article shall not apply to any peson, firm or corporation engaged in the business of repairing automobiles or trucks or other vehicles who is operating under a business license issued by the City, and whose occupation or business is not dismantling, wrecking or disassembling automobiles, trucks or vehicles of any kind."

SECTION 3. Section 5211 of Chapter V, Article 2 is hereby amended to read as follows:

"Section 5211 Heavy Objects - Disposal Of.

Every person occupying or having charge or control of any premises in the City shall, at least once within each calendar month, collect and dispose of all waste material and debris, and all other material not included in the meaning of waste material as defined in Section 5200, which may have accumulated on his premises; provided that building or construction waste or debris need be removed upon completion of construction operations. All such waste and debris in this

section defined shall be removed to such dump grounds as may be provided or designated by the City or County."

SECTION 4. Sections 9298.15 through 9298.18 of the Costa Mesa Municipal Code are hereby repealed having been by this Ordinance re-enacted as Division II or Article 6, Chapter III Costa Mesa Municipal Code. All other ordinances or parts thereof in conflict herewith are hereby repealed.

SECTION 5. This Ordinance shall take effect and be in full force and effect thiryt (30) days from and after its passage, and before the expiration of fifteen (15) days after its passage, shall be published once in the Orange Coast Daily

Pilot, a newspaper or general circulation printed and published in the City of Costa Mesa, together with the names of the members of the City Council voting for and against the same.

PASSED AND ADOPTED this 16th day of April, 1973.

_____
Mayor of the City of Costa Mesa

ATTEST:

_____
City Clerk of the City of Costa Mesa

§23. When notice complete

The giving of notice by personal delivery is complete upon delivery of a copy of the notice to the person to be notified. The giving of notice by mail is complete upon the expiration of four days after deposit of the notice in the mail, except that in the case of a notice informing any person of an offense against him under Section 40001, the notice is complete 10 days after mailing.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any peson of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

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No. 82-669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Respondent City of Costa Mesa was constitutionally compelled to hold a pre-nuisance-abatement hearing before towing and temporarily storing three inoperative motor vehicles which Petitioner Sidney Soffer had illegally parked in full public view on his front lawn, despite the fact that the City spent weeks trying to resolve the matter informally with Petitioner and then gave Petitioner 14 days' formal written notice of the opportunity for a hearing but received no timely or proper hearing request from him?

2. Whether Petitioner should reasonably have understood that a motor vehicle which could not legally be driven because it did not display valid license

plates and registration was "inoperative" within the meaning of the City of Costa Mesa Ordinance No. 73-13?

3. Whether the judgment for Respondents in this civil rights action was in any event correct because the jury necessarily found that Petitioner maintained a public nuisance, that Respondent James Weir acted reasonably and in good faith in abating the public nuisance, that Respondent Robert Campagna had nothing to do with the temporary removal of Petitioner's motor vehicles, that any alleged injury was not the result of an established governmental policy or custom by Respondent City of Costa Mesa, and that Petitioner in fact suffered no compensable injury?

4. Whether this Court should even consider the petition for certiorari

which is based on facts not supported by the incomplete appellate record and which seeks interpretation of state laws unrelated to any federal constitutional claim?

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No. 82-669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

1. The Action.

In this civil rights action, Petitioner Sidney Soffer claimed $157.50 in out-of-pocket losses plus general and punitive damages against Respondents James Weir, Robert Campagna, and the City of Costa Mesa, California.

2. The Ordinance.

At issue was City of Costa Mesa Ordinance 73-13. (Appendix D to Petition for Certiorari.) This nuisance-abatement ordinance declared that dismantled, abandoned or inoperative motor vehicles which were stored in public view reduced the value of private property, promoted blight and deterioration, invited plundering, created fire hazards, were attractive nuisances, harbored rodents and insects, were injurious to the public health, safety and general welfare, and therefore were public nuisances. (Section 1.) The City was required to give the owners of both the property and the vehicle 10 days' written notice of intention to abate the public nuisance. (Section 8.) If a request was received from an owner within

10 days, the City was required to hold a pre-abatement hearing and take evidence on the propriety of the abatement. (Section 9.) The ordinance required residents to obtain a permit to store any vehicle which did not qualify under state law to be operated on the highways. (Section 20.)

3. **The Facts.**

The evidentiary facts stated in the petition for certiorari are not supported by the incomplete appellate record. The partial reporter's transcript and exhibits actually show the following facts:

In response to neighborhood homeowners' complaints, on October 12, 1977, Respondent James Weir, a Costa Mesa zoning officer, inspected three dusty old automobiles which were parked in

public view in Petitioner's front yard and which had not been driven for some time. None of the vehicles had visible license plates or current registration. (R.T. 12-13; Trial Exhibits A, B, C, F, G, H and I.)

Weir spoke with Petitioner about the public nuisance. Petitioner said he wanted to discuss the matter with the City Attorney and asked Weir for the number of the applicable city ordinance. On October 18, 1977, Weir left Petitioner the number. (R.T. 8-9.)

Meanwhile, Weir checked with the motor vehicle department but found no current records on Petitioner's vehicles. (R.T. 12-13; Trial Exhibits A, B and C.) Based on the physical condition of the vehicles and the fact that without valid licenses and registrations

they could not legally be operated on the streets (California Vehicle Code §4000), Weir determined the vehicles were inoperative and constituted a public nuisance within the meaning of City of Costa Mesa Ordinance 73-13. (R.T. 11-13, 35.)

Hearing nothing from Petitioner for more than a week, on October 25, 1977, Weir issued Petitioner three written notices of the City's intention to abate the nuisances. Each notice explained that Petitioner had 10 days to request a public hearing and if he failed to initiate such a request within 10 days the City would abate the nuisance without a hearing. (R.T. 9; Trial Exhibits A, B and C; see Appendix C to Petition for Certiorari.)

On November 8, 1977, 14 days after the notices were issued, no request for a hearing had been received and the vehicles were still parked in Petitioner's front yard. Petitioner refused to discuss the matter (R.T. 43), so Weir had the vehicles towed and temporarily stored out of public view. (R.T. 16-17.) Petitioner then claimed he had requested a hearing, and he telephoned Respondent Robert Campagna, the City Attorney, as the vehicles were being towed away. (R.T. 16-18.)

Later that same day, the City received in the mail copies of Petitioner's three abatement notices on which the printed phrase "request a public hearing" had been circled. There were no other markings or signatures on the copies and nothing to indicate they came

from Petitioner or were intended to constitute a request for a hearing. (Trial Exhibits A, B and C.)

Three days later Petitioner paid $127.50 to reimburse the City for towing and storage charges (Trial Exhibit A), and he allegedly spent $30.00 more to tow his vehicles back to his front yard.

4. The Jury Trial.

The District Court refused to instruct the jury that if Petitioner's motor vehicles did not constitute public nuisances then Respondents denied him due process of law. (Petitioner's Requested Instruction D.) The court did instruct the jury:

> "At a minimum, due process requires that a person be given notice and a prior opportunity to be heard absent an emergency or extraordinary situation before

his property is taken." (Petitioner's Requested Instruction C.)

The jury returned a general verdict in favor of all Respondents.

REASONS FOR DENYING THE PETITION

1. The District Court And Court Of Appeals Fully Acknowledged Petitioner's Right To Notice And Opportunity For Hearing Prior To Abatement Of The Public Nuisance He Maintained.

Contrary to Petitioner's assertion, the Courts below did not interpret due process as "something less" than prior notice and opportunity for hearing. (Petition, pp. 14-15.) In fact, the District Court specifically instructed the jury as follows (Petitioner's Requested Instruction C):

"At a minimum, due process requires that a person be given

notice and a prior opportunity to be heard absent an emergency or extraordinary situation before his property is taken."

Similarly, the decision of the Court of Appeals held (Appendix A to Petitioner for Certiorari, pp. 6-7):

> "The Due Process Clause requires that parties whose rights are to be affected are entitled to be notified of the proposed action and they are entitled to be heard. [Citations.] It is also a fundamental requirement of due process that the opportunity to be heard be granted 'at a meaningful time and in a meaningful manner.' [Citations.]"

2. Due Process Does Not And Should Not Require A Hearing Prior To Abatement Of A Public Nuisance Where Ample Notice Of The Right To A Pre-Abatement Hearing Is Given And No Hearing Is Requested.

Petitioner's fundamental argument is that he was entitled to a hearing before

the City towed away the inoperative vehicles from his front lawn whether or not he requested such a hearing. (Petition, pp. 16-20.)

This is clearly not the law nor has any case so held. The due process clause does not even necessarily require that the opportunity for a prior hearing be given before property is seized. (**Calero-Toledo v. Pearson Yacht Leasing Co.**, 414 U.S. 663, 678-679, 40 L.Ed.2d 462, 94 S.Ct. 2080, 2089 (1973); **Parratt v. Taylor**, 451 U.S. 517, ___ L.Ed.2d __, 101 S.Ct. 1908, 1915 (1981).) Thus, **Sutton v. City of Milwaukee**, 672 F.2d 644, 645 (7th Cir. 1982), holds that a city does not violate due process by towing an illegally parked car without first giving the owner notice and opportunity to be heard. Similarly, **Stypmann**

v. City & Cty. of San Francisco, 557 F.2d 338 (9th Cir. 1977), acknowledges that in the towing of illegally parked cars due process may be satisfied by a post-seizure hearing. (See also, Mitchell v. W. T. Grant Company, 416 U.S. 600, 611, 40 L.Ed. 406, 94 S.Ct. 1895, 1902 (1974) ["The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'"].)

Even if due process necessarily required the opportunity for a hearing prior to abatement of a public nuisance, such a hearing could reasonably be conditioned on a timely request. It would be an absurd waste of public resources

to require a hearing on the abatement of each and every public nuisance even if no one wanted a hearing. This is particularly true in cases such as this where, in the vast majority of instances, no one would contest the removal of an abandoned or inoperative motor vehicle.

This case is far afield from **Doe v. Gallinot**, 486 F.Supp. 983 (C.D. Cal. 1979), affirmed in **Doe v. Gallinot**, 657 F.2d 1017 (9th Cir. 1981), on which Petitioner principally relies. That case involved the involuntary incarceration of a person who was allegedly gravely disabled due to a mental disorder. The Court held that due process may require a hearing even without a request "where potential deprivation is severe and the risk of error is great."

(486 F.Supp. at 983.) Those circumstances simply do not exist here. The potential deprivation is not in the involuntary physical incarceration of Petitioner's person, but in the miniscule property loss, if any, caused by the temporary storage of his three inoperative motor vehicles. The risk of error is not in the highly-subjective determination of disability and mental disorder, but in the highly-objective determination whether an automobile is inoperative. 1/

1/ Petitioner cites a District Court opinion in **Geanacos v. Nelson**, C-74-2406 RFP and **Kemp v. Gain**, C-75-0993 RFP from the Northern District of California. That unpublished "Memorandum for Motion for Class Certification and Cross-Motion for Summary Judgment" is not properly cited as precedent. In any event, the memorandum notes that in the case of a city towing cars left on the street for more than 72 hours, notice of the right to a hearing was the crucial (continued)

As the decision of the Court of Appeals correctly points out, the requirements of due process vary with the subject matter and circumstances of each case. (**Fuentes v. Shevin**, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983, 1996 (1972); **Youngberg v. Romeo**, _____ U.S. ___, ____ L.Ed.2d ____, 102 S.Ct. 2452, 2460 (1982).) The law does not require the use of a sledge hammer where a fly swatter will do. No case has ever ruled, nor should the due process clause require, that a hearing must be held,

---

1/ (continued) factor, not the hearing itself: "An advice containing the description of the violation asserted and of the hearing provided, together with a warning that failure to take advantage of the hearing within 24 hours [sic], securely affixed to a clearly visible place on the vehicle, should be adequate notice." (Memorandum, at p. 23.)

whether or not requested following ample notice of the right to request a hearing, before an inoperative motor vehicle which constitutes a public nuisance may be towed and temporarily stored.

3. The Jury Verdict And Decision And The Court Of Appeals Are Obviously Correct And Present No Basis For Review By This Court.

The general verdict for the defense in this case necessarily implies that the jury found the individual Respondents acted reasonably and in good faith in abating the nuisance; that any alleged denial of civil rights was not the result of a custom or policy of Respondent City of Costa Mesa; that Petitioner did not in fact properly request a pre-abatement hearing after he was given ample notice; that even if there had

been a pre-abatement hearing the three inoperative vehicles would still have been declared a public nuisance; and that, in any event, Petitioner suffered no compensable damage as a result of the alleged violation of civil rights. Thus, even if Petitioner were correct on his due process claim, which he is not, the judgment is nevertheless proper and does not merit this Court's attention.

CONCLUSION

The petition for certiorari presents no new or important issues. Petitioner's case was fairly tried and correctly decided in light of well-established principles of constitutional and statutory law. Accordingly, the petition should be denied.

Respectfully submitted,

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Of Counsel

Office - Supreme Court, U.S.
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No. 82-669

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SIDNEY L. SOFFER,

Petitioner,

vs.

CITY OF COSTA MESA, JAMES T. WEIR and ROBERT R. CAMPAGNA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

SIDNEY L. SOFFER
900 Arbor Street
Costa Mesa, Ca. 92627
(714) 642-5511
Pro Se

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No. 82-669

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Respondents.

PETITIONER'S REPLY MEMORANDUM

The City's Brief in Opposition is reminiscent of the old flim-flam man at the traveling side show with three shells and a pea. The "mark" could not find the pea if he had four chances - let alone one. The shells are the misrepresentations and the half-truths, and the facts are the pea.

Petitioner will attempt to point out enough facts in Respondents' Brief

show that he had been deprived of his property under color of law without due process.

I Color of Law and Deprivation

Respondent, James Weir, a Zoning Officer of the City of Costa Mesa, inspected three vehicles on Petitioner's property, determined the vehicles were inoperative and constituted a public nuisance within the meaning of City of Costa Mesa Ordinance 73-13 (Respondents' Brief in Opposition pp 3,4,5). On November 8, 1977, Weir had the vehicles towed and temporarily stored. (R.B. p.6). Three days later, Petitioner paid $127.50 to reimburse the City for towing and storage charges. (R.B. p. 7). Petitioner accepts the above statements of the City to be true and therefore, establishes the first piece of the puzzle: Color of Law and the Deprivation of Property.

II Due Process

1. Hearing

On November 8, 1977, 14 days after the notices were issued, no request for a hearing had been received and the vehicles were still parked in Petitioner's front yard. Weir had the vehicles towed. (R.B. p.6).

Petitioner accepts the above statement of the City to be true, with the exception of "front yard." (The three vehicles were parked to the rear of the property and on a driveway.)

Petitioner has alleged throughout this action that he did not have a hearing and opportunity to be heard, either before the deprivation or after. As the City has failed to show a hearing at any time, the Court will, hopefully, accept it as an uncontested fact, the Petitioner had no hearing. Thus, we have one more piece to the puzzle.

2. Notice

At this point the shells are being moved faster and faster, making it much more difficult to find the pea.

On October 25, 1977, Respondent, Weir "issued" Petitioner three written notices of the City's intention to abate the nuisances. Each notice explained that Petitioner had 10 days to initiate a request for a hearing and upon failure to do so, the City would abate the nuisance without a hearing (R.B. p. 5). The City admits receiving the three notices from Petitioner upon which the printed phrase "Request a Public Hearing" had been circled, on November 8, 1977 - 14 days after said notices were "issued." (R.B. p.6). The City also states the notices were received in the "mail" after the towing of the vehicles. Petitioner takes issue only

to the word issued and whether or not the City received the notices before or after the towing. The word "issued" is a half-truth, as the notices were "mailed" to Petitioner. A seemingly small point, except for that fact it would lead one to believe that the notices were delivered to Petitioner - instead of mailed, in which case, there would not be, by law, an extension of four or five days for service by mail. (Calif. Vehicle Code Section 23 and California Code of Civil Procedure Sec. 1013). The time of day the City received the notices could also be critical as to whether or not the City received them before the towing. It is the contention of the Petitioner that the City policy at the time was to pick up the mail at the post office at about 7:30 a.m. (this was not brought out on the record). Petitioner mailed the three requests for

hearing on November 4, 1977, the tenth day, per instructions on the notices. It is the contention of the Petitioner that the puzzle should be complete. He timely requested a hearing, received none, was deprived of his three vehicles and $127.50 without a hearing, under Color of Law, and therefore, deprived os his constitutionally guaranteed right to due process.

III Misplaced Reliance

Respondents' reliance on California Vehicle Code, Section 4000 and 5202 for the definition of the term "inoperative vehicle" (Appellee's Brief p. 12) is misplaced as the the two sections are only two small parts of the law. Therefore, another of the many half-truths submitted to the courts by the City.

IV Petitioner's Vehicles Were Legal and Operable

Petitioner admits that the two Sections of C.V.C. 4000 and 5202 do state that a vehicle may not be operated on the highway unless it is currently registered and with its license plates attached and visible (R.B. p. i). However, the City fails to point out to the court that Section 5203 of C.V.C. states that Section 5202 does not (emphasis added) apply to license plates which the department pursuant to law, ordered the plates surrendered. Petitioner's 1947 Cadillac and 1960 Cadillac both had their plates surrendered prior to Petitioner buying them. They both had temporary permits on their windshields.

1. Section 4606 of C.V.C. states that when application for registration has been made, the vehicle may

be operated on the highways until the new registration is received and license plates are displayed on the vehicle - "if any."

2. Section 4604 states that a nonoperated vehicle may be operated or left standing upon the highway if the registration had expired, provided, the department receives an application and certificate of nonoperation within 20 days after the vehicle is first operated or left standing upon any highway. As the three vehicles were not on the highway, they were, as such, legal and could, therefore, have been driven, for up to 20 days, without plates or current registration.

Even if the above sections somehow did not apply to Petitioner's three vehicles, the 1960 Cadiallac was legal and operable as it was currently registered on the day it was towed

away. (Appellant's Opening Brief, Appendix F).

V. No Public Nuisance

As to the judgment for Respondents in this civil rights action being correct because the jury necessarily found that Petitioner maintained a public nuisance (R.B. p. ii), the only reasons Respondent, Weir gave for abating the vehicles were that the vehicles were not currently registered and were in violtion of City ordinance 72-13. (R.T. p. 32 1.10).

Petitioner contends that something that is not a nuisance per se or in fact, cannot be made a nuisance merely by an ordinance. "The question of nuisance or obstruction must be determined by general and fixed laws, and it should not be tolerated that the local Municipal authorities of a City declare any particular business or structure, a

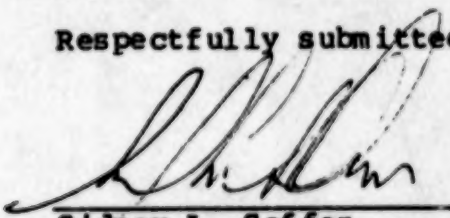
nuisance, in such a summary mode, and enforce its decision at its own pleasure. Yates v. Milwaukee 77 U.S. 497 at 498.

CONCLUSION

It is the contention of Petitioner that thousands of vehicles are being towed and destroyed all over California under unconstitutional ordinances similar to 73-13 and therefore, a very important issue. The Legislature did not mean to give the City the power which it attempts to exercise; and if it did mean to do so, it had no power to give it. Ordinance 72-13 allows for the towing of a vehicle from private property solely because the City inspector thinks it is inoperative and the owner does not request a hearing. The ordinance then demands the destruction of

the vehicle (Petition for Writ Appendix "D" p 22). Accordingly, the Petition should be granted.

Respectfully submitted,



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